



California Sportfishing Protection Alliance

“An Advocate for Fisheries, Habitat and Water Quality”

Chris Shutes, FERC Projects Director

1608 Francisco St., Berkeley, CA 94703

Tel: (510) 421-2405 E-mail: blancapaloma@msn.com

Web: www.calsport.org

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Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
(Via e-mail)

Dear Ms. Townsend:

The California Sportfishing Protection Alliance appreciates the opportunity to comment on the December 6, 2010 fourth public draft of the 401 Certification for the relicensing of the Oroville Facilities, FERC #2100.

The fourth draft differs from the third draft only in that it presents four options for Section S9, which addresses the Habitat Expansion Agreement developed in conjunction with the Oroville Settlement Agreement. Since the Board has stated in its December 15, 2010 meeting agenda that it will accept comments only on the changes made to its previous (third) draft 401, we confine our comments to these changes. We note for the record that we stand by our September 24, 2010 comments on the third draft, and respectfully request review of those comments by the Board prior to the December 15 Board meeting.

Option 1 in Section S9 of the December 6, 2010 draft 401 Certification for Oroville retains the language of the July 9, 2010 third draft of the 401. In our September 24, 2010 comments on the third draft, CSPA criticized this language. We stated: “The Habitat Expansion Agreement does not contain clear and enforceable requirements by which the Board can independently evaluate the HEA’s effectiveness.” (p. 4). We continued:

Does compliance mean that we have a new population with an annual escapement of 2,000 spring-run salmon? Does it mean that there is sufficient spawning habitat for that many salmon to spawn, if they were to arrive? How is that habitat going to be measured, or simply evaluated? Who decides if there is habitat for such a population, whether that habitat is sufficient to support this population over a long period of time, or whether this population is “geographically separate,” or at least separate enough?

The Board should specify in the 401 what requirements must be met by the Habitat Expansion Agreement, including metrics and timelines, and what the consequences will be if those requirements are not met. The Board should also explicitly state its authority to require additional measures should the outcome of the HEA prove to be inadequate. (p. 15)

Finally, we concluded:

The Board must set clear metrics that will “fully mitigate” the loss of fish passage and upstream habitat caused by the Oroville Facilities and the PG&E hydroelectric projects upstream. The Board must require and enforce alternative actions if the outcome of Habitat Expansion Agreement does not measure up to the level of mitigation set forth by the Board. (p. 18)

Option 2 answers only a small part of this criticism: it provides for an enforcement entity (Deputy Director, Water Rights) to determine whether on the back end the goals of the Habitat Expansion Agreement have been achieved. However, the Habitat Expansion Agreement itself does not contain clear metrics that evaluate whether the goals of the HEA are being met. Indeed, significant debate is presently occurring, since PG&E and DWR published their proposed Habitat Expansion Plan in November, 2010, over the sufficiency of that Plan in meeting the HEA’s requirements. Since the Board has chosen not to define clear guidelines for compliance, clear measures of compliance, and consequences for failure to comply, Option 2 simply punts a final determination to the undefined discretion of the Deputy Director for Water Rights. There is some role for NMFS that is not clearly defined (“upon advice from the National Marine Fisheries Service”); presumably the intent is to require concurrence from NMFS that the HEA’s goals have been achieved before the Deputy Director signs off. However, as advisable as such concurrence may be, it is no substitute for the responsibility of the Board under the Clean Water Act to objectively define enforceable conditions to mitigate the loss of salmonid habitat caused by the construction and operation of Oroville and PG&E’s projects on the North Fork Feather River.

Option 3 is slightly better, in that under this option the Board would have greater oversight of the development of the Habitat Expansion Plan. This would better retain the Board’s independent authority to evaluate whether the goals of the Habitat Expansion Agreement were being met. However, this option does no better than Option 1 or Option 2 in objectively defining what “the goals of the habitat expansion plan” are: it contains no clear guidelines for compliance, no measures of compliance, and no consequences for failure to comply. It is once again all left up to the discretion of the Deputy Director for Water Rights.

Option 3 is also better in that authority is explicitly reserved to the Deputy Director in the event that the Habitat Expansion Plan’s goals are not timely met, or in the event that fish passage were to be required. However, greater definition of the decision space should be provided, rather than simply saying the condition could be modified. As a starting point, reference should be made to the purpose that such modification would have: to mitigate

the loss of salmonid habitat in the Feather River watershed caused by the construction and operation of the project.

Option 4 retreats to do no more than reserve authority for the Deputy Director if no habitat expansion plan whatever is implemented. It is the most hands off of all the options. It doesn't even contain a protocol for review of a habitat expansion plan, let alone clear definition of how a plan would be judged. This would be almost complete abdication: failing non-implementation of the HEA, the Board would simply wash its hands of the matter. A decision by the Board not to require enforceable conditions to mitigate the loss of salmonid habitat in the Feather River watershed caused by the construction and operation of the project would represent a grave failure by the Board to fulfill its responsibilities under the Clean Water Act.

Regulatory authority carries with it the statutory responsibility to regulate. If the Habitat Expansion Agreement itself had clear performance metrics, the Board would not have been placed in its current predicament. However, because of the unclear language of the HEA, the Board now has an affirmative duty to step in and define compliance. Its job is not to interpret the intent of HEA signatories or of the HEA's language, but to objectively define the loss of salmonid habitat that needs to be mitigated, to objectively define how the adequacy of that mitigation needs to be measured, and to enforce implementation of the mitigation.

Respectfully submitted,



Chris Shutes
FERC Projects Director
California Sportfishing Protection Alliance